

The Grand Rapids Press, a Division of Booth Newspapers, Inc., a Division of the Herald Company and Detroit Newspaper Local 13N, Graphic Communications International Union, AFL-CIO. Case 7-CA-41951

May 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 14, 2000, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Grand Rapids Press, a Division of Booth Newspapers, Inc., a Division of the Herald Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Steven Carlson, and A. Bradley Howell, Esqs., for the General Counsel.

Bruce H. Berry, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on October 20, 1999. The charge was filed by the Detroit Newspaper Local 13N, Graphic Communications International Union, AFL-CIO (the Union). The complaint alleges that The Grand Rapids Press, a Division of Booth Newspapers, Inc., a Division of the Herald Company (the Respondent) violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested information.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d. Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In adopting the judge's conclusions that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the complete personnel files of the 22 bargaining unit employees and any future memoranda intended for personnel files regarding any bargaining unit member's work performance or alleged misconduct, we note that the memoranda at issue, which Baker, the Respondent's operations director, entered and retained on his computer, were intended to be part of unit employees' personnel files.

¹ All dates are in 1999 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, has published a daily newspaper at its facility in Grand Rapids, Michigan, where it annually receives gross revenues in excess of \$200,000, and in which it advertises various nationally sold products. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

I find that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that by virtue of Section 9(a) of the Act, the Union is the exclusive bargaining representative of the Respondent's employees in the following unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All pressroom employees employed under the conditions and at the scale of wages set forth in the parties' collective-bargaining agreement, but excluding foremen, supervisors, guards, and clerical employees as defined under the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

The Union has been the collective-bargaining representative of the unit employees since 1967. Jack Howe is a printing pressman and the president of the Union. The Union is represented at the Respondent by employees who serve as chapel chairman and assistant chapel chairman. Earnest Bellechasses was the chapel chairman at the time of the hearing.

Todd Ramsey was discharged by the Respondent on December 22, 1998, and Robert Dykhuizen was discharged in early 1999. The Union filed grievances over both discharges. Both individuals were bargaining unit employees and union representatives at the Respondent at the time of their discharge.² Howe investigated the grievances and reviewed the employees' personnel files. The Union found memos that were disciplinary in nature in the personnel files that were unknown to the Union and the employees. The memos were written by Pete Baker, the Respondent's operations director. The Union produced the memos at the unfair labor practice hearing. There were five memos produced from Ramsey's file with dates of November 14, 1997, and June 18, September 9, December 15, and December 22, 1998. In the November 14 memo, Baker states that he met with the union leadership, and told them that he had information that the "web was broken on purpose and warned them if we can ever prove sabotage there will be a dismissal." The June 18 memo states that there was a meeting with the union leadership and the pressroom about what was deemed improper pictures of women in the pressroom. It was stated that the employees were told that this was the second and last warning and that there were jobs at stake. The September 9 memo involves an incident where Baker allegedly witnessed Ramsey leaving the building early. The memo states that Ramsey was warned concerning this conduct which if it occurred again would lead to discipline up to and including discharge. The December 15 memo documents reports concerning alleged problems with Ramsey's performance, and the December 22 memo documents a series of events and allegations leading to Ramsey's suspension and discharge. The memos

² The employees were discharged, at least in part, due to allegations of sabotage.

produced from Dykhuizen's file were dated January 28, February 1, and February 22, 1999. The January 28 memo documents a meeting with Baker, Dykhuizen, and Bellechases concerning a dispute as to whether double time was to be paid for certain Sunday work. The memo states that, "After the meeting Bob was so mad he threw a plate on back-side of press out of anger." The February 1 memo concerned a warning to all pressroom employees about alleged acts of sabotage and possible discharge of an employee as a result. The February 22 memo contained allegations that Dykhuizen was intentionally slowing down his press.³

By letter to Baker dated March 29, Howe requested the "complete personal file" for 22 named pressroom bargaining unit employees. By letter to Howe dated March 31, Respondent's attorney, Bruce Berry replied to the Union's information request stating that:

We are unaware of any grievances concerning any of those individuals. In addition, it does not appear that the Bullard-Plawecki statute provides you with right of access to those files.

Accordingly, we must deny your request pending an explanation as to why you seek copies of those files.

By letter to Berry dated April 5, union attorney, Duane Ice wrote, in pertinent part, the following in continuance of the Union's pursuit of the requested information:

You asked for the rationale for Local 13's request for information—the complete personnel files of bargaining unit employees.

The Grand Rapids Press has discharged in the last couple of years four chapel chairmen or assistant chapel chairmen (stewards and assistant stewards): Cecola, Dietrick, Ramsey, and Dykhuizen. Grievances are now pending concerning Ramsey and Dykhuizen. In addition, Local 13 filed an unfair labor practice charge alleging that the Grand Rapids Press has a discriminatory policy and practice of discharging Local representatives.

In the course of representing the four discharged Local representatives named above, Local 13 learned that the personnel files contained within them various memos to the personnel file. These memoranda recited occurrences and statements which allegedly occurred. These memoranda, the Local believes, were used and will be used to support the discharges.

Local 13 needs the personnel files for several reasons:

1. Memoranda of the type described above might constitute grievable events all by themselves. They are disciplinary in nature and are ultimately used to support discipline or discharge. Why else do they exist? If memoranda exist which would arguably constitute discipline or arguably constitute support for or a basis of discipline, the Local is entitled to grieve those memoranda. The Local does not have to wait until a discharge occurs to learn of the exis-

tence of such memoranda, contest their insertion in the personnel file or contest their content.

2. The Local is entitled to know what is in the files of bargaining unit members at the present time so that if the Company, as the Local believes, adds memoranda to the file after the fact, such memoranda can be challenged on that basis. The argument would be that the Company, in future discipline, is entitled to consider the past work records as it exists, but the Company is not entitled to pad or manipulate that work record. The Local needs to be able to demonstrate such padding or manipulation occurs and needs a "benchmark" file. As I said, this issue is not based on mere suspicion; it is demonstrable that memoranda never disclosed to or discussed with Ramsey, Dykhuizen, Cecola, and Dietrick were included in their personnel files and turned over to the Local only after they were discharged.

3. The Local desires to investigate further whether the Company is discriminating against Local representatives. It needs additional information to do so. The collective bargaining agreement states, in section 20.2, that "An employee shall not be discharged for Local activities, except and unless such activities interfere with the normal and regular work at the Company." If there is such discrimination, the Local intends to grieve under section 20.2 to end the practice. Such discrimination might be evidenced in one of two ways: (1) at the point the Company discharged Local representatives, the Company inserted memoranda into the personnel files of these individuals, but no similar memos exist in other personnel files even though the events might relate to other individuals, or (2) such memoranda exist in a number of personnel files, on the same occurrences, but the Company selectively discharged Local representatives. The Local is entitled to grieve any discrimination practice within 10 days of "knowledge" of the discrimination, even though the discharges occurred at various times more than 10 days ago. (section 18.2 of the contract.) Further, a discriminatory practice would be a continuing violation.

In addition, Local 13 hereby makes the following *standing* information request: any future memoranda regarding any bargaining unit member's work performance or alleged misconduct. We desire the memoranda at the time of the event or conversation they relate to, so they can be challenged if necessary. We do not want the Local or the bargaining unit member to learn of their existence only at the time of discharge. If we are not provided such memoranda, we will argue that the Company is barred from using them as support for later discipline or discharge. The Local wants to be able to challenge such memoranda contemporaneously with the events, when memories are fresh and witnesses are available. The Local makes this request because of the history recited above.

Please let me know whether you will make the personnel files available. If not, it will be necessary to file an unfair labor practice charge.

Berry responded by letter dated April 8 where he stated, in pertinent part:

Your letter failed to show that the information requested is relevant to any pending grievance or the administration of the collective-bargaining agreement.

³ There was also a memo dated November 18, 1997, produced at the hearing from the personnel file of discharged employee and former union representative, Tony Cecola. The Union gained access to Cecola's file while processing his discharge grievance. The memo referenced a meeting between management and union officials, including Cecola, concerning an allegation of sabotage on a press. Three employees who worked in the area of the press break were named in the memo. While the document was maintained in his personnel file, Cecola was not one of the three named employees.

Therefore, The Press will not produce the requested information.

With respect to your request for future memoranda regarding any bargaining unit member's work performance or alleged misconduct, there is no provision in the contract which entitles the Union to such information. In addition, it has not been the parties' practice for the Company to provide the Union with copies of such memoranda. If the Union wishes to change this condition of employment, we suggest raising the issue when the next contract is negotiated.

At the time of the unfair labor practice hearing, Ramsey and Dykhuizen's cases had been to arbitration and the parties were waiting for the arbitrator's decisions. The due date for the arbitrator's decision was 30 days from the date that the briefs were filed with the arbitrator. At the time of the hearing, the briefs had been filed in the Ramsey arbitration, but they had not been filed in the Dykhuizen case. Howe testified that he did not know if there was anything that allowed the Union to reopen the arbitration record if they obtained new evidence, but that, "I would assume that we would at least have the right to grieve if we discover new evidence. Also, the arbitrator was asked to remain in control of the arbitration for the settlement of (the) grievance." Howe conceded that it was the Union, not the Respondent, that entered the above-described memos concerning Ramsey and Dykhuizen into the record before the arbitrator.

The collective-bargaining agreement in effect at the time of the unfair labor practice hearing has an April 1, 1998, effective date. Dietrick and Cecola were discharged before this collective-bargaining agreement was negotiated. Their cases settled short of arbitration. The Union requested and received copies of Dietrick and Cecola's personnel files in order to investigate their discharges, and a suspension that Dietrick had received 2 years prior to his discharge. Along these lines, Howe conceded that he was aware that there were memos in personnel files before Ramsey and Dykhuizen were discharged, but he stated that the memos were isolated. Howe credibly testified that the Union felt that the memos in Ramsey and Dykhuizen's files were different than prior memos in that they were less specific and did not necessarily relate to the employee in whose file they were maintained.⁴

During negotiations for the most recent collective-bargaining agreement, the Union did not request that a right to review personnel files be incorporated in the contract and the collective-bargaining agreement does not contain a provision directly

dealing with information requests. Article 19.1 of the contract concerning the adjustment of disputes provides:

Should a dispute arise between the parties, a protest may be raised by the Union and processed to the first step of the following three step procedure. Any such dispute relative to the scale of wages or construction to be placed upon any clause of this Agreement, or alleged violations thereof may continue through the second and third step of the procedure.

The grievance procedure culminates in binding arbitration.

Baker's testimony revealed that when he meets with union officials he keeps a record of the meeting by maintaining notes in his computer. Baker makes similar notes when there are disciplinary meetings with employees which are attended by union representatives. The notes are made within 1 or 2 days of the meeting, but are not printed out at the time that they are made. The employee is not informed that notes are being made. The notes are printed when there is a discharge and the personnel file is requested. Baker also prints out a copy of the notes if an employee requests a copy of his personnel file. Baker testified that it was his "understanding that the notes are a part of the personnel file," and that he obtained this understanding from the Respondent's attorney.

Baker explained that the notes concerning employees could relate to incidents where the employee is warned of possible discipline for a repeat offense or where an employee is actually disciplined. Baker testified that, "at the time of the termination any note that I had that was relevant to Mr. Dykhuizen was included in his personnel file." Baker testified that discipline short of termination, including oral and written warnings, can be grieved under the collective-bargaining agreement and that warnings and suspensions are arbitrable under the contract. He testified that written warnings are different from his notes in that the employee is given a copy of the written warning which is put in the employee's personnel file immediately. According to Baker, the significance of a written warning is that if the employee repeats the offense they can be discharged. Baker memorializes, in his notes, oral warnings that he gives to employees. He explained that an oral warning can be preliminary to a written warning.

IV. POSITIONS OF THE PARTIES

The General Counsel argues that the information sought is presumptively relevant in that it relates to bargaining unit employees. It is argued that information also relates to pending grievances concerning Ramsey and Dykhuizen and that the Union is entitled to information even if there were no pending grievance to allow it to police the contract. That is, the Union has a right to the information in order to decide whether to file a grievance. It is asserted that the Respondent's statutory duty to furnish the information exists regardless of whether the right to the information is specified in the parties' collective-bargaining agreement.

The Respondent states in its posthearing brief that the parties were still waiting for the arbitrator's decision in the Ramsey case, but that a decision favorable to the Union had issued in the Dykhuizen arbitration. The Respondent argues at page 10 of its brief that:

[T]he General Counsel has failed to establish the relevancy of its request for present and future personnel files. There were no pending arbitrations or grievances for

⁴ In crediting this aspect of Howe's testimony, I would note that during counsel for the Respondent's questioning of Howe concerning his alleged prior knowledge that employees' files contained memos similar to those in dispute, I gave counsel the following admonition:

JUDGE FINE: Well I would suggest, I mean, that if you have some particular memos that he's seen before in other files that you think are comparable to these, that you show them to him because—otherwise I'm not going to know what to make of any of this.

Yet, the Respondent failed to show Howe or otherwise introduce memos that it asserts demonstrate that the Union had knowledge, before the signing of the parties' current collective-bargaining agreement, that Baker had a practice of creating the memos in dispute. Accordingly, and based on considerations of demeanor, I credit Howe's testimony as set forth above. I also credit Howe's testimony that the number and nature of the memos contained in Ramsey and Dykhuizen's files led Howe to make the Union's current information request.

which these files would have been relevant. The Dietrick and Cecola matters settled. The parties are awaiting a decision on Ramsey which was fully litigated before the arbitrator. A decision has been reached in Dykhuizen. The Union requested and received copies of the personnel files of Dietrick, Cecola, Ramsey, and Dykhuizen following their respective terminations. More importantly, the Company, if there is a pending grievance or arbitration, has always made personnel files of disciplined or terminated employees, available to the Union.

Howe testified that he was aware there were memos in personnel files prior to the Ramsey and Dykhuizen grievances. This knowledge was well before contract negotiations for the current agreement. Despite this knowledge, the Union did not bargain for a provision in the agreement that would allow the Union access to the personnel files whether or not a grievance was pending.

The Respondent contends that the Union is “fishing” for information for which it is not entitled. The Respondent argues at page 16 of its brief that the memos, “are merely a memory aid to Baker.” It is contended that the Union does not need the memos to grieve “disciplinary matters, as the Union is fully aware of when an employee receives an oral or written warning.” The Respondent argues that Baker’s testimony is undisputed that the Union is present for all verbal warnings to press-room employees. It asserts the Respondent did not rely on the memos in proving its case at the Ramsey or Dykhuizen arbitrations. Rather, it was the Union that submitted the memos into evidence at the Ramsey arbitration. The Respondent asserts that the Union was able to litigate both cases to conclusion without the information it currently seeks.

The Respondent states at page 18 of its brief that:

Most of the information in the personnel files furnished to the Union and in evidence in this case related to the Company’s investigations into the discharges. Under the Bullard-Plawewski Employee Right to Know Act, the information furnished the Union falls with the definition of a personnel file.

The Respondent recites the following portion of the referenced Michigan State statute at page 18 of its brief:

“Personnel records” means a record kept by the employer that identifies the employee, to the extent that the record is used or has been used, or may affect or be used relative to that employees’ qualifications or for employment, promotion, transfer, additional compensation, or disciplinary action. . . . However, a record concerning an occurrence or fact about an employee kept pursuant to this subparagraph may be entered in to a personnel record if entered not more than 6 months after the date of the occurrence or the date the fact becomes known. MSA §17.62(1).

It is asserted in the brief that the Respondent furnished the memos to the Union, leading to the current information request, on advice of counsel based on this State’s statute.

V. ANALYSIS

A. Legal Principles

In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the following principles were set forth:

Section 8(a)(5) and (1) of the Act imposes on an employer the obligation to furnish information requested by a union which is necessary for, and relevant to, the union’s performance as the exclusive bargaining representative of its employees. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151–154 (1956); *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863, 866–867 (9th Cir. 1977).

The standard for assessing relevancy is a liberal discovery-type standard requiring only a probability that the requested information is relevant and will be of use to the union in carrying out its statutory duties and responsibilities as the employees’ bargaining representative. Consequently, the Board and the courts have consistently held that information relating to the terms and conditions of employment of unit employees is presumptively relevant because it goes to the core of the employer-employee relationship and no specific showing of relevance is required. The burden falls upon the employer to prove a lack of relevance. However, where the information sought relates to matters outside the unit, the union has the burden of showing relevancy. *NLRB v. Acme Industrial Co.*, supra; *Graphic Communications Local 13 v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979); *San Diego Newspaper Guild Local 95*, supra.

Applying these principles, the Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances. An actual grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731.

Concerning the type of information in dispute here, the Board has repeatedly held that requested bargaining unit employee disciplinary records are “presumptively relevant and must be furnished on request, unless (the) relevance is rebutted.” See *Antioch Rock & Ready Mix*, 328 NLRB No. 116, slip op. at 1 (1999), where “copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year,” were required to be produced. See also, *Prime Energy Limited Partnership*, 328 NLRB No. 143, slip op. at 1 (1999) (not reported in bound volume). In *General Dynamics Corp.*, 270 NLRB 829 (1984), a respondent was required to provide computer printouts showing disciplinary runs for five departments of employees. In *Pfizer, Inc.*, 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985), the Board noted that “Arbitrators routinely consider employee work records in deciding whether employers have applied their disciplinary rules in a consistent, evenhanded, and nondiscriminatory manner.” See also *Washington Gas Light Co.*, 273 NLRB 116 (1984). The Board has also required employers to provide unions with personnel files of employees. See *Saginaw General Hospital*, 320 NLRB 748 (1996). This is particularly so, in instances where discipline of employees is at issue. See *Leland Stanford Junior University*, supra.; *Bacardi Corp.*, 296 NLRB 1220 (1989); and *Bloomsburg Craftsmen*, 276 NLRB 400 (1985).

In *NLRB v. New Jersey Bell Telephone Co.*, 936 F.2d 144, 151–153 (3d Cir. 1991), the court enforced the Board major-

ity's order requiring the respondent to provide a union with a requested security department report and the first page of a computer record concerning a customer complaint. The court distinguished the requested materials from witness statements which the Board had held in prior cases did not have to be provided. In doing so, the Third Circuit stated:

Most persuasively, businesses have been ordered to reveal documents similar to those at issue here. In *United Technologies Corp.*, 277 NLRB 584 (1985), the Board ordered the disclosure of all internal security investigative reports concerning alleged employee negligence. The Board rejected the corporation's argument that such reports need not be released simply because they contained the results of supervisory investigations. See *id.* at 588–589.

While there are factual differences between the Security Reports involved in *United Technologies* and the Security Reports here, *United Technologies* stands for the broader proposition that investigative reports, relied upon by management when disciplining an employee, are generally discoverable. . . . This rule is compatible with the underlying purposes of the Act in general, and Section 8(a)(5) in particular. It would be difficult for an employee's representative to be effective without access to the facts underlying management's disciplinary decision. Additionally, a rule that prohibits management from shielding its investigative reports by making a bare assertion that those reports are, or merely contain, witness statements, is also a permissible construction of the Act.

In affirming the Board's conclusion that the requested materials did not constitute a witness statement, the court quoted from the Board majority as follows:

It is undisputed that the [complaining] customer did not review the reports, have them read to her . . . or in any manner adopt them. . . . Further, there is no contention that the reports are or even approximate a verbatim transcript. . . . [T]he reports are in essence the handiwork of the Respondent's officials, reflective only of their impressions of what transpired . . . as well as whatever other material the officials may have deemed appropriate to include in the reports.

The Board majority stated in *New Jersey Bell Telephone Co.*, 300 NLRB 42, 43 (1990), *enfd.* 936 F.2d 144 (3d Cir. 1991), that, "Under these circumstances in which the connection between the complaining customer and the reports prepared by the Respondent's officials is so attenuated, we find that the reports are far more readily characterized as the work product of the Respondent than as a statement by the complaining customer. See *Square D Electric Co.*, 266 NLRB 795, 797 (1983); *United Technologies Corp.*, 277 NLRB 584, 589 (1985)."

B. Conclusions

I find that, by applying the principles set forth above, the information sought by the Union is relevant to the performance of its statutory functions and that the Respondent has failed to establish a defense justifying its refusal to supply the information. The Union is requesting the personnel files of 22 bargaining unit members in order to obtain memos maintained by the Respondent, as part of those files, relating to the discipline of bargaining unit employees. The Respondent asserts in its posthearing brief that the General Counsel has failed to estab-

lish the relevancy of the Union's request for present and future personnel files. However, since the requested information relates to discipline of bargaining unit employees it is presumptively relevant and the burden is on the Respondent to demonstrate lack of relevancy. See *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Prime Energy Limited Partnership*, 328 NLRB No. 143 (1999) (not reported in bound volume); and *Antioch Rock & Ready Mix*, 328 NLRB No. 116 (1999) (not reported in bound volume).

Even assuming arguendo, as asserted in the Respondent's posthearing brief, that an arbitrator has sustained the Dykhuizen grievance, and considering the status of the Ramsey grievance at the time of the unfair labor practice hearing, I do not agree with Respondent's contention that the Union's information request as it relates to those grievances has been rendered moot or that the complaint should otherwise be dismissed. It was stated in *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), *enfd.* 943 F.2d 741 (7th Cir. 1991), that, "One of the Respondent's defenses is that the request for information made by the Union in this case is moot because the Hospital has closed its doors and the bargaining unit no longer exists. The right of the Union to the information requested must be determined by the situation which existed at the time the request was made, not at the time the Board or the courts get around to vindicating that right. Otherwise, important rights under the Act would be lost simply by the passage of time and the course of litigation. Part of the duty to supply relevant information includes the duty to do so in a timely fashion." See also *NLRB v. U.S. Postal Service*, 128 F.3d 280, 284 fn. 6 (5th Cir. 1997); *Providence Hospital v. NLRB*, 93 F.3d 1012, 1020 (1st Cir. 1996); and *Washington Gas Light Co.*, 273 NLRB 116 (1984), where the Board issued an affirmative order requiring the production of certain disciplinary records, although an arbitrator had already ordered the grievant reinstated.

The above cited case law demonstrates, and I so find, that the Respondent is obligated to supply the Union with the requested information, even if the underlying grievances for which it was requested settled while the Union's information request was being litigated before the Board and the courts. In the instant case, the complaint reads, in pertinent part, that "Since about March 29, 1999, and continuing to date, Respondent has failed and refused to provide complete and timely information as requested by the Charging Union." Thus, the Respondent was on notice that its failure to provide the information in a timely fashion was alleged as unlawful. Accordingly, the Respondent's refusal to provide the requested information in a timely manner in and of itself warrants a finding that it violated Section 8(a)(5) and (1) of the Act.

Moreover, I do not find that the Union's information request concerning the Ramsey and Dykhuizen grievances has been rendered moot here. First, the Respondent has never provided the requested information or engaged in alternative action that would obviate the Union's need for the information. The Union was requesting the information in an effort to establish disparate treatment by the Respondent of union representatives Ramsey and Dykhuizen. Under the state of the record before me at the time of this trial, the Ramsey and Dykhuizen grievances remained pending before an arbitrator. Even if an arbitrator's award favorable to the Union has subsequently issued in one or both of these grievances, there is no evidence or contention before me that the Respondent has complied with those awards. In this regard, Howe's credited testimony is undisputed that the arbitrator had agreed to maintain control

puted that the arbitrator had agreed to maintain control over the arbitrations until the settlement of the grievances. Howe also testified that whether or not the Union had the right to reopen the record before the arbitrator concerning these grievances, that he assumed that the Union at least had the right to grieve if they discovered new evidence. In these circumstances, the Respondent has failed to establish that the requested information would no longer be useful to the Union as it pertained to the Ramsey and Dykhuizen grievances.

Regardless of whether the requested information continues to be needed to litigate or help resolve the Ramsey and Dykhuizen grievances, Ice's April 5 letter informed the Respondent that the Union was seeking the information for matters beyond the pending grievances. It was stated there, that the Respondent had discharged four union officials in the last couple of years and the Union was attempting to investigate whether the Respondent was engaging in a practice of discriminating against Local officials. It was stated that section 20.2 of the collective-bargaining agreement provides that, "An employee shall not be discharged for Local activities," and that if there was such a practice the Union intended to independently grieve it.⁵ It was also pointed out in the letter that if memos exist in other employees' files, "which would arguably constitute discipline or support for discipline, the Local is entitled to grieve those memoranda." The Respondent was also informed that the Union wanted the records to prevent the Respondent from padding or manipulating employees' files in cases of future discipline.

Baker's testimony reveals that oral and written warnings to employees are memorialized in his notes, which Baker considers to be part of the employees' personnel file. The Respondent uses a progressive disciplinary procedure in that an oral warning can be preliminary to a written warning which in turn can be preliminary to an employee's discharge. Baker testified that employees were not informed that his notes were being made part of their file. Baker also testified that discipline, including oral warnings, is grievable under the collective-bargaining agreement, and that it was his view that suspensions and warnings are arbitrable under the contract.

The forgoing reveals that the Union has informed the Respondent that it needs the requested information to determine whether to file additional grievances that are cognizable under the parties' contract. As set forth above, this is a legitimate function of the Union, for the Board has held that an actual grievance need not be pending for the Union to be entitled to requested information. Rather, it is sufficient if the requested information is potentially relevant to an evaluation as to whether a grievance should be pursued. See *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *United Technologies Corp.*, 274 NLRB 504 (1985); and *United-Carr Tennessee*, 202 NLRB 729, 731.⁶ Thus, regardless of the status of the

Ramsey and Dykhuizen grievances, the Union has established a continuing need for the requested information.

I do not find the Respondent's contention persuasive that a union official's presence when an employee receives an oral warning obviates the need for the Union to review Baker's memorandum concerning that warning before filing a grievance. First, Baker testified that an employee is not advised that a memo is being placed in their personnel file as a result of these meetings. While it can perhaps be argued that the Union is currently aware of Baker's policy of placing memos in the employee's file, the Union is entitled to review the memo before deciding whether Baker's conduct warrants the filing of a grievance. In this regard, Baker's practice creates at least two different issues. The first is whether the employee was properly warned, and the second is whether the warning has been appropriately memorialized in the employee's file. In this regard, Howe credibly testified that some of the incidents that Baker memorialized were raised during the Ramsey and Dykhuizen arbitrations and there were disagreements between the parties as to the facts concerning the underlying incidents. Moreover, if the Union did concur with the manner in which Baker memorialized an incident, it may obviate the need for the Union to file a grievance. I therefore conclude that the Union was entitled to the actual memos which, per Baker's admission, constituted disciplinary records that were made a part of employees' personnel files. It is not incumbent upon the Union to go through the burdensome procedure of polling its members and Local officials to obtain their second hand opinions as to how Baker viewed a particularly incident. See *Chesapeake & Potomac Telephone Co.*, 259 NLRB 225, 231 (1981), *enfd.* 687 F.2d 633 (2d Cir. 1982). Moreover, I conclude that Baker's memos constituted disciplinary reports and work product of the Respondent which are "generally discoverable" pursuant to a Union's request for information. *NLRB v. New Jersey Telephone Co.*, 936 F.2d 144, 151 (3d Cir. 1991).⁷

is entitled to requested information in order to process a grievance through an employer's internal grievance procedure where no collective-bargaining agreement was in place. See *Westside Community Mental Health Center*, 327 NLRB 661 (1999).

⁷ Cases cited by the Respondent do not require a different result. *Bohemia, Inc.*, 272 NLRB 1128 (1984), involved a request for information concerning the alleged transfer of bargaining unit work to another facility. The Union's information request concerning the operations of both plants was held not to be presumptively relevant and the Union failed to establish its relevancy. The Respondent also cites *NLRB v. U.S. Postal Service*, 128 F.3d 280 (5th Cir. 1997), where the Court refused to enforce a Board order concerning the provision to a union of two requested personnel files. First, it must be said that this case reversed a Board ruling, and I am bound by Board law. See *Ford Motor Co.*, 230 NLRB 716, 718 *fn.* 12 (1977), *enfd.* 571 F.2d 993 (7th Cir. 1978), *affd.* 441 U.S. 488, 493 *fn.* 6 (1979). Moreover, in the *Postal Service* decision, the court concluded that some of the information contained in the personnel files was relevant to the union's grievance. However, the Postal Service had raised privacy concerns in refusing to turn over the complete files. The court noted that the *Postal Service* had in fact turned over some of the information to the union and therefore had attempted to accommodate the union's request. The court therefore remanded the case to the Board for consideration of whether the parties should engage in accommodative bargaining about the remainder of the materials to be provided. The Respondent here has not raised privacy claims as a defense to providing the Union with the requested information and it has not offered any accommodation with respect to the Union's information request. Moreover, the Union is not engaged in a fishing expedition as the Respondent contends for the

⁵ Ice was in actuality referring to contract sec. 21.2.

⁶ The actual arbitrability of these potential grievances does not constitute a defense for the Respondent's refusal to provide the requested information. The Board stated in *United Technologies Corp.*, *supra*, that a respondent's assertion that a particular grievance was not arbitrable was not a defense to its refusal to provide a union with requested information. It was stated that, "The Board consistently has rejected similar arbitrability arguments." The Board explained that, "before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all." In fact, the Board has held that a union

I also reject the Respondent's contention that the Union should be denied the requested information because it failed to negotiate a provision in the parties' collective-bargaining agreement calling for the general production of personnel files. It is stated in *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996), that:

The Respondent claims that its "written consent" policy has been in effect for more than 20 years, and that the Union was fully aware of the practice but has not, prior to the Quales' grievance, complained or objected to it. While conceding that the Union's failure to object would not, without more, constitute a waiver, it nevertheless argues that the Union's inaction in this regard, when viewed together with the Union's purported acknowledgment, acquiescence, and adherence to the policy, clearly established "a mutual, longstanding practice" between the parties, and amounted to a clear and unmistakable waiver by the Union of its right to access personal files without written authorization from employees. I disagree.

The law regarding waivers of statutory rights is fairly well settled. As the Respondent readily acknowledges in its posthearing brief, such a waiver must be clear and unmistakable, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *New York Telephone Co.*, 299 NLRB 351, 352 (1990), and will not be lightly inferred by the Board. *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987). Further, when relying on a claim of waiver of a statutory right, the employer bears the burden of proving that a clear relinquishment of that right has occurred, *NLRB v. Challenge-Cook Brothers of Ohio*, 843 F.2d 230, 233 (6th Cir. 1988); and the fact that "the parties contract is silent on the issue, or that the union may have acquiesced in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." See *Register-Guard*, 301 NLRB 494, 496 (1991), citing *Owens-Corning Fiberglas*, 282 NLRB 609 (1987); *H. J. Scheirich Co.*, 300 NLRB 687, 689 (1990); *Peerless Publications*, 231 NLRB 244, 258 (1977). See also *St. Luke's Hospital*, 314 NLRB 434, 440 (1994); *E. R. Steubner, Inc.*, 313 NLRB 459 (1993).

The Board has long held that the Union's right to information is a statutory rather than a contractual right. See *American Standard*, 203 NLRB 1132 (1973). In the *Timken Roller Bearing Co.*, 138 NLRB 15, 16 (1962), *enfd.* 325 F.2d 746 (6th Cir. 1963), *cert. denied* 376 U.S. 971 (1964), the Board stated that there was a:

well established rule that the mere existence of a grievance machinery does not relieve a company of its obligation to furnish a union with information needed to perform its statutory functions.

Furthermore, we agree with the Trial Examiner that the Union did not surrender its right to secure any of the wage data simply because it was unsuccessful in obtaining a provision in the contract requiring the production of such data by the Respondent. We can infer no 'clear and unequivocal' waiver of a statutory right from such failure at the bargaining table.

The Respondent is in essence contending here that the Union waived its statutory right to make a general request for disciplinary memos contained in employees' files. However, it points to no contractual language or long standing practice to support its position. The Respondent's contention, standing alone, that Howe had reviewed two personnel files which contained disciplinary memorandum prior to the Union's entering into the parties' current contract does not constitute sufficient evidence to meet the Respondent's burden of establishing a statutory waiver of the Union's right to information under Board law. Particularly, when the Respondent never produced at the hearing the disciplinary memos that Howe allegedly reviewed prior to entering the collective-bargaining agreement.

Accordingly, I find that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to provide the Union the complete personnel files requested in Howe's letter of March 29, 1999,⁸ and the information requested in Ice's letter of April 5, 1999, where the Union sought, "any future memoranda regarding any bargaining unit member's work performance or alleged misconduct." While the latter request pertains to information that may be generated in the future, Baker testified that he does not provide the Union or the employee with notice that he is generating any particular memo which may be incorporated in an employee's personnel file. Therefore, in the circumstances here, there is no other convenient way for the Union to request this information.

CONCLUSIONS OF LAW

1. The Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Union is the exclusive collective-bargaining representative of the Respondent's employees in the following unit appropriate for collective bargaining:

All pressroom employees employed under the conditions and at the scale of wages set forth in the parties collective-bargaining agreement, but excluding foremen, supervisors, guards, and clerical employees as defined under the Act.

4. The Respondent has failed and refused to bargain with the Union in good faith, in violation of Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with the complete personnel files of the 22 bargaining unit employees named in the Union's letter of March 29, 1999, and its refusal to provide the Union with any future memoranda regarding any bargaining unit member's work performance or alleged misconduct as requested in the Union's letter of April 5, 1999.

5. The unfair labor practices described above are affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

⁸ In reaching this conclusion, I note that the Respondent makes no confidentiality argument concerning the provision of employee personnel files to the Union. In fact, it concedes that it will provide the files to the Union of disciplined or terminated employees if there is a pending grievance.

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

Respondent knows specifically that the Union is seeking disciplinary records which the Respondent admits it maintains in the personnel files.

ORDER

The Respondent, The Grand Rapids Press, a Division of Booth Newspapers, Inc., a Division of the Herald Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Detroit Newspaper Local 13N, Graphic Communications International Union, AFL-CIO, by refusing to furnish, or to timely furnish, the Union, on request, with information necessary and relevant to the performance of its function as the exclusive collective-bargaining representative of the employees in the following unit:

All pressroom employees employed under the conditions and at the scale of wages set forth in the parties collective-bargaining agreement, but excluding foremen, supervisors, guards, and clerical employees as defined under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish forthwith to the Union the following information.

(1) The complete personnel files of the 22 bargaining unit employees named in the Union's letter of March 29, 1999.

(2) Any future memoranda regarding any bargaining unit member's work performance or alleged misconduct as requested in the Union's letter of April 5, 1999.

(b) Within 14 days after service by the Region, post at its [facility] in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to

Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all current employees and former employees employed by the Respondent at any time since March 29, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Detroit Newspaper Local 13N, Graphic Communications International Union, AFL-CIO, by refusing to furnish, or to timely furnish, the Union, on request, with information necessary and relevant to the performance of its function as the exclusive collective-bargaining representative of the employees in the following unit:

All pressroom employees employed under the conditions and at the scale of wages set forth in the parties collective-bargaining agreement, but excluding foremen, supervisors, guards, and clerical employees as defined under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Detroit Newspaper Local 13N, Graphic Communications International Union, AFL-CIO, the complete personnel files of the 22 bargaining unit employees named in the Union's letter of March 29, 1999, and any future memoranda regarding any bargaining unit member's work performance or alleged misconduct as requested in the Union's letter of April 5, 1999.

THE GRAND RAPIDS PRESS, A DIVISION OF BOOTH
NEWSPAPERS, INC., A DIVISION OF THE HERALD
COMPANY